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KENMARK VENTURES, LLC

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re:

ANTHONY THOMAS and WENDI
THOMAS,
AT EMERALD, LLC,
Debtors.

Case No. BK-N-14-50333-GS

Case No. BK-N-14-50331-GS

Chapter 7

[Jointly Administered]

Date: September 13, 2019

Time: 9:30 a.m.

Court: Clifton Young Federal Building

300 Booth Street

Reno, Nevada 89509

Hon. Gary Spraker

**KENMARK VENTURES LLC JOINDER IN
TRUSTEE'S OPPOSITION TO DEBTORS'
MOTION TO VACATE ORDER VOID ON ITS
FACE**

KENMARK VENTURES, LLC ("Kenmark") joins in the Chapter 7 Trustee's Opposition
("Opposition") to Debtor Anthony Thomas ("Debtor") Motion to Vacate Order Void on Its Face ("Rule
60(b)(4) Motion"), and respectfully states:

1 **I. Introduction**

2 Kenmark is a creditor and interested party in the above-captioned bankruptcy cases by virtue of
3 a final \$4.5 million dollar judgment in Santa Clara Superior Court, Case No. 108CV130667 (the
4 “Judgment”). The Judgment was determined to be non-dischargeable after a trial in this Court under 11
5 U.S.C. §523(a)(2)(A)¹ for fraud – intentional misrepresentation and concealment.²

6 **II. Debtor Has Not Shown Prejudice from the Bankruptcy Court’s Denial of His**
7 **Request for a Continuance**

8 In addition to the arguments offered in the Opposition, Kenmark contends that proof of
9 prejudice is a necessary element for a denial of procedural due process claim.³ *Godoy v. Spearman*, 834
10 F.3d 1078, 1092-93 (9th Cir. 2015), *Burkett v. Cunningham*, 826 F.2d 1208, 1221 (3d Cir. 1987), cited
11 in *Parcel Consultants* (see fn.3, below) The relevant inquiry is whether courts can be confident in the
12 reliability of prior proceedings when there has been a procedural defect. *See Lane Hollow Coal Co. v.*
13 *Dir., Office of Workers' Compensation Programs*, 137 F.3d 799, 808 (4th Cir. 1998) (considering
14 “fairness of the trial and its reliability as an accurate indicator of guilt”); see also *Rose v. Clark*, 478
15 U.S. 570, 577-78, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986) (asking whether adjudication in the
16 criminal context without procedural protections can “reliably serve its function as a vehicle for
17 determination of a case).

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19
20 ¹ Further references to Title 11 of the U.S. Code are referred to as “Code §.”

21 ² Both the Bankruptcy Appellate Panel and Ninth Circuit affirmed in unpublished opinions, and the
22 Debtor petitioned the U.S. Supreme Court for certiorari, which is pending.

23 ³ See, *In re New Concept Housing, Inc.*, 951 F.2d 932, 939 (8th Cir. 1991) (“*New Concept Housing*”)
24 (ruling that failure to give the debtor notice of a hearing on the approval of a settlement violated two of
25 the Federal Rules of Bankruptcy Procedure, but (rejecting the views of the dissenter that the failure to
26 provide notice of the hearing resulted in a denial of due process that could not be subject to harmless
27 error analysis) that “the violation of these rules constituted harmless error, because the Debtor’s
28 presence at the hearing would not have changed its outcome. The Debtor had neither a legal nor factual
basis for establishing that the settlement was unreasonable.”). See also *In re Parcel Consultants, Inc.*,
58 Fed. Appx. 946, 951 (3d Cir. 2003) (unpublished) (“*Parcel Consultants*”) (“Proof of prejudice is a
necessary element of a due process claim.”); *Cedar Bluff Broad., Inc. v. Rasnake*, 940 F.2d 651 (Table)
[published in full-text format at 1991 U.S. App. LEXIS 17220, at *7], 1991 WL 141035, at *2 (4th Cir.
Aug. 1, 1991) (unpublished) (creditor complaining of notice deficiency failed to show, among other
things, “that it was prejudiced by the lack of notice to general creditors”).

In considering reliability of the Bankruptcy Court's decision, "[t]he entire record must be considered and the probable effect of the error determined in the light of all the evidence." 11 Charles Alan Wright, Arthur R. Miller, et al., *Federal Practice & Procedure* § 2883 (3d ed. 2016) [hereinafter "Wright & Miller"]; see *Matusick v. Erie Cty. Water Auth.*, 757 F.3d 31, 50-51 (2d Cir. 2014). "[I]f [the court] cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error," then it must find a procedural due process violation. *Kotteakos v. United States*, 328 U.S. 750, 765, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946), cited in *Elliott v. GM LLC (In re Motors Liquidation Co.)*, 829 F.3d 135, 161-63 (2d Cir. 2016)

The record in the Debtor's Chapter 11 Bankruptcy Case as detailed in the Trustee's Opposition makes clear a two (2) week continuance to allow the Debtor to try and find counsel would not have changed the outcome and therefore did not prejudice the Debtor. The Thomas Emerald was uninsured, and there was evidence in the record the Debtor was engaged in self-dealing, failed to comply with Bankruptcy Court orders, retained undisclosed attorneys, was not capable of handling international financial transactions, failed to conduct any due diligence on the buyer of the Thomas Emerald, and was untrustworthy. (Motion, Transcript at pp.10:22 – 18:2)⁴ A two (2) week continuance for the Debtor to try and find an attorney would not have made a bit of difference.

III. Conclusion

The Debtor had sufficient notice his counsel was moving to withdraw and there was a hearing on motions to appoint a Chapter 11 trustee and convert. The Debtor appeared at the hearings, and was allowed to argue. Moreover, the Bankruptcy Court gave the Debtor the opportunity to dismiss the Chapter 11, and the Debtor declined. (Rule 60(b)(4) Motion, Transcript at pp.32:12 – 16) Under these circumstances the denial of the Debtor's request for a continuance was harmless error, if it was error at all. It does not rise to the level of a denial of procedural due process, the Bankruptcy Court's decision was reliable, and the Debtor's Rule 60(b)(4) Motion should therefore be denied.

Dated: August 9, 2019

/s/ Wayne A. Silver
Wayne A. Silver, attorney for
KENMARK VENTURES, LLC

⁴ Page numbers reference the ECF filing page.

CERTIFICATE OF SERVICE

I served the foregoing KENMARK VENTURES LLC JOUNDER IN TRUSTEE'S
OPPOSITION TO DEBTORS' MOTION TO VACATE ORDER VOID ON ITS FACE by the
following means on August 9, 2019 to the persons listed below:

XX **Electronic mail**, by transmitting a true copy thereof to the following:

Name	Email Address
Anthony Thomas	Atemerald2@gmail.com

XX **Regular mail**: Service of this document was made on August 9, 2019 by regular, first class
United States mail, postage fully pre-paid, addressed to:

Anthony Thomas
7725 Peavine Peak Court
Reno, NV 89523

I declare under penalty of perjury that the foregoing is true and correct. Signed this 9th day of
August, 2019 at Henderson, Nevada.

/s/ Wayne A. Silver
Wayne A. Silver